Service Date: August 28, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Application of	)	UTILITY DIVISION
Dakota Services, Ltd. and	)	
U S WEST Communications, Inc.	)	DOCKET NO. D98.6.125
Pursuant to Section 252(e) of the	)	
Telecommunications Act of 1996 for	)	ORDER NO. 6094
Approval of their Interconnection Agreement	)	

FINAL ORDER

Introduction and Procedural Background

1. On February 8, 1996, the Telecommunications Act of 1996 (1996 Act)[1] was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to the local exchange markets. The 1996 Act sets forth methods by which local competition may be encouraged in historically-monopolistic local exchange markets. The 1996 Act requires companies like U S WEST Communications, Inc. (U S WEST) to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. §§ 251 and 252.

2. U S WEST Communications, Inc. (U S WEST) entered into an interconnection agreement with Dakota Services, Ltd. (Dakota) for interconnection and resale of U S WEST services according to the 1996 Act. U S WEST filed the parties’ agreement, entitled "Interconnection Agreement Between U S WEST Communications, Inc. and Dakota Services, Ltd. for Montana” (Agreement) with the Montana Public Service Commission (Commission) on

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

June 8, 1998. The Agreement was docketed as D98.6.125 and it provides for interconnection and for Dakota to resell U S WEST's local exchange services in Montana.

3. The Commission issued a Notice of Commission Action on Applications for Approval of Interconnection Agreement and Notice of Opportunity to Intervene and Comment on July 1, 1998, giving public notice of the requirements that the Commission approval of the filings be nondiscriminatory toward other telecommunications carriers not parties to the agreement and be consistent with the public interest, convenience and necessity. The notice stated that no public hearing was contemplated unless requested by an interested party by July 15, 1998. The notice further stated that interested persons could submit limited comments on whether the agreements met these requirements no later than July 31, 1998.

4. No hearing has been requested and no comments or requests for intervention received in regard to the Dakota Agreement. The Dakota Agreement is substantially the same as previously approved interconnection agreements between U S WEST and other competitive local exchange carriers (CLECs). The Commission has rejected certain provisions in these contracts and directed U S WEST to remedy its failure to comply with Commission orders in any future filing. U S WEST offered to withdraw and resubmit this application for approval, but the Commission will not require that U S WEST’s contract with Dakota be resubmitted.

5. The Commission rejects the four contract sections discussed below consistent with other resale agreements that U S WEST has negotiated with CLECs.

Applicable Law and Commission Decision

6. The standards for approving an interconnection agreement differ, depending on whether the agreement has been voluntarily negotiated or has been arbitrated by a state commis-

sion. 47 U.S.C. § 252(e)(2). The Agreement submitted for approval in this proceeding was negotiated voluntarily by the parties and thus must be reviewed according to the provisions in 47 U.S.C. § 252(e)(2)(A).

7. Section 252(e)(4) of the 1996 Act provides that a negotiated agreement submitted for a state commission's approval must be approved or rejected within 90 days or it will be deemed approved. Thus, Commission approval or rejection according to the substantive standards set forth in the 1996 Act must issue by September 6, 1998, 90 days following the submission of the Dakota Agreement for Commission approval.

8. The Commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Section 252(e)(2)(A) prescribes the grounds for rejection of an agreement reached by voluntary negotiation:

> (2) GROUNDS FOR REJECTION.--The State commission may only reject--
>
> (A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. § 252(a)] if it finds that
>
> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
>
> (ii) the implementation of such agreement or portion is not consistent withe the public interest, convenience, and necessity;

9. Notwithstanding the limited grounds for rejection in 47 U.S.C. § 252(e)(2)(A), the Commission's authority is preserved in § 252 (e)(3) to establish or enforce other requirements of Montana law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements.

Such compliance is subject to § 253 of the 1996 Act which does not permit states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

10. Unlike an agreement reached through arbitration, a voluntarily negotiated agreement need not comply with standards set forth in §§ 251(b) and (c). 47 U.S.C. §§ 251(b), 252(c) and 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in § 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission.

11. By approving this Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that §§ 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

12. No comments have been received that express any reservations about the parties’ agreement not complying with federal law as cited above or with state telecommunications requirements. The MCC, who represents the consumers of the State of Montana, has not intervened in this approval proceeding, and has not filed comments to indicate that any portion of the agreement is not consistent with the public interest, convenience and necessity. There have been no objections raised that the Agreement discriminates improperly or is not consistent with the public interest, convenience and necessity.

13. With the exception of particular sections of the Agreement as specifically discussed below, the Commission finds that the terms in the parties’ Agreement appear to

conform to the standards required by the Act and should be approved. In approving this Agreement, the Commission is guided by provisions in state and federal law which have been enacted to encourage the development of competitive telecommunications markets. Section 69-3-802, MCA, for example, states that it is the policy of the State of Montana to encourage competition in the telecommunications industry and to provide for an orderly transition to a competitive market environment.

The Commission rejects the following terms:

14. Ordering and Maintenance - Section 11.3.4 includes a provision that Proof of Authorization for placing orders on behalf of the end user shall consist of documentation acceptable to U S WEST, which may be obtained by "A prepaid returnable postcard supplied by [Dakota] which has been signed and returned by end user. [Dakota] will wait fourteen (14) days after mailing the postcard before placing an order to change." This subsection is not consistent with Montana law and is rejected. *See* . 69-3-1303, MCA.

15. Construction - Section IV.E.7 of the Agreement (p. 10) states:

> Resold services are available only where facilities currently exist and are capable of providing such services without construction of additional facilities or enhancement of existing facilities. However, if [Dakota] requests that facilities be constructed or enhanced to provide resold services, USWC will review such requests on a case-by-case basis and determine, in its sole discretion, if it is economically feasible for USWC to build or enhance facilities. If USWC decides to build or enhance facilities, USWC will develop and provide to [Dakota] a price quote for the construction. If the quote is accepted, [Dakota] will be billed the quoted price and construction will commence after receipt of payment.

The Commission finds that this provision could conflict with the public interest and should be rejected. Circumstances may arise where U S WEST is required by law to construct facilities. The parties may agree to the terms in Section 11.5.7 for instances where U S WEST is not required to construct facilities, but the Commission rejects this section as presently written because it does not consider such instances. The parties may amend this section of the Agreement to so provide.

16. Payment - Section 11.10 sets forth in detail the provisions for payment to U S WEST by Dakota. It provides for suspension of the provision during the initial three months of the Agreement and for three billing cycles. According to Section 11.10.5, Dakota's payment to U S WEST, if not made pursuant to the terms of this section, could place the Dakota end user customers' services in jeopardy of being disconnected through no fault on their part.

17. This section contains no provision for notification to the Commission of a pending disconnection of service to an indeterminable number of end users. U S WEST must follow certain Commission rules prior to terminating service to its own end users--as must Dakota. If notified of a pending termination of service to Dakota's customers, the Commission can act appropriately. It is not consistent with the public interest to permit U S WEST to terminate service to Dakota's end users with no notification to the Commission. The Commission rejects Section 11.10.4 of the Agreement. The parties may amend this section of the Agreement to include a notification provision that allows for a reasonable notification to the Commission that will afford the Commission time in which to take any appropriate action to protect end users.

18. Dispute Resolution - Section 26.17 sets forth the parties' agreement pertaining to resolution of claims, controversies or other disputes which cannot be settled through negotiation. It provides that such disputes be resolved by arbitration conducted by a single arbitrator, who is an attorney, under the rules of the American Arbitration Association, and that the arbitrator's

award shall be final and binding and may be entered in any court having jurisdiction thereof. While the parties are free to provide for dispute resolution in this manner according to the 1996 Act, the resolution arrived at by the arbitrator may not be consistent with the public interest, convenience and necessity. The Commission concludes that this contract provision should be rejected because it does not provide for notification to the Commission of issues to be arbitrated or of the subsequent decision reached by the arbitrator. The public interest and the facilitation of market entry is better served by such notification. The parties may amend this section of their Agreement to address this concern.

19. Regulatory Approval: Section 26.30 provides that the Agreement “will be filed with the Commission and may thereafter be filed with the FCC and shall, at all times, be subject to review by the Commission or the FCC." To the extent the parties intend that the FCC approve or reject the Agreement, this section is inconsistent with the 1996 Act. While the FCC may preempt state law, it has no other role that this section may contemplate. We reject this section, as we have done before with identical sections. The Commission rejection of this section has no real effect on the Agreement and there is no need to amend this section. The FCC may preempt state law, but it may only do so according to correct procedures. Further , the parties have ongoing obligations to negotiate in good faith to arrive at mutually acceptable modifications and amendments.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. Dakota intends to resell telecommunications services and interconnect with U S WEST in U S WEST territories throughout Montana. Section 69-3-804, MCA (1995), has previously provided an exemption from Commission regulation for resellers. Senate Bill 89, passed by the 1997 Montana Legislature and signed into law by the Governor of Montana on April 22, 1997, removes the exemption from regulation in Montana for resellers of regulated telecommunications services. As a reseller of regulated telecommunications services in Montana, Dakota will be subject to Commission authority to supervise, regulate and control public utilities. Before providing services in Montana, Dakota initially will be required to register with the Commission as a telecommunications provider and to provide the requested information to the Commission, if it has not already done so.

3. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

4. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally,* the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the* Communications Act of 1934, 47 U.S.C. . . 151, *et seq.*). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

5. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

6. The Commission has jurisdiction to approve the resale agreement negotiated by the parties and submitted to the Commission for approval according to § 252(e)(2)(A). Section 69-3-103, MCA.

7. Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(e) limits the Commission’s review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to approve or reject the Dakota Agreement by January 29, 1998, or the Agreement will be deemed approved.

8. The Commission may reject a portion of a negotiated agreement and approve the remainder of the agreement if such action is consistent with the public interest, convenience and necessity and does not discriminate against a carrier not a party to the agreement. 47 U.S.C. § 252(e)(2)(A).

Order

THEREFORE, based upon the foregoing, it is ORDERED that the resale agreement of the parties, submitted to this Commission for approval pursuant to the 1996 Act, is approved as discussed herein, subject to the following conditions:

1. The parties may file an amendment to the Agreement without delay consistent with the Commission’s decision in this proceeding.

2. The parties shall file subsequent amendments to the Agreement with the Commission for approval pursuant to the 1996 Act.

DONE AND DATED this 25th day of August, 1998, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

____
DAVE FISHER, Chairman

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NANCY MCCAFFREE, Vice Chair

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BOB ANDERSON, Commissioner

____
DANNY OBERG, Commissioner

____
BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. <u>See</u> ARM 38.2.4806.